Puncak Niaga (M) Sdn Bhd & Anor v Sykt Sidhu Adek Beradek Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1-22–405 OF 2006
SURAYA OTHMAN J
10 JANUARY 2014

Tort — Negligence — Damages — Burden of proof — Failure to prove special damages — Whether nominal damages can be awarded

Tort — Negligence — Duty of care — Road accident causing contamination of gazetted water catchment area and water treatment plant by crude palm oil — Statutory duty on public not to cause contamination — Whether duty breached — Whether defence of ignorance of the law acceptable — Whether causation proven — Whether losses reasonably foreseeable — Whether plaintiff contributorily negligent in not taking measures to prevent contamination — Quantum of damages

Tort — Negligence — Statutory duty — Statutory duty on public not to cause contamination — Road accident causing contamination of gazette water catchment area — Whether duty breached — Whether publication in official gazette constitutes sufficient notice — Whether defence of ignorance of the law acceptable

The first plaintiff (Puncak Niaga) was the operator of water treatment plants, one of which was the Gombak Water Treatment Plant ('Gombak WTP'). The raw water for the Gombak WTP was solely derived from the river, Sungai Gombak ('the Gombak intake'). The Gombak intake is located at KM 28 of the Kuala Lumpur-Karak Highway ('the highway'). Sungai Gombak is *gazetted* as a water catchment area before it goes through to the water treatment plant operated by Syabas at Gombak WTP. The second plaintiff ('Syabas') was the distributor of treated water. Syabas purchased treated water from the Gombak WTP from Puncak Niaga to be supplied to the consumers in Gombak. The plaintiffs claimed for damages from the defendants for expenses and losses they suffered as a result of contamination of Sungai Gombak caused by a collision at KM 29.2 on the highway involving the defendants' oil tankers, NOs BCY 4383 and DAN 4669, respectively driven by the first and second defendants' drivers. As a consequence of the collision, crude palm oil carried by both tankers had spilled into the highway and flowed into the drainage system along the highway towards Sungai Gombak. Due to the contamination of Sungai

Gombak by crude palm oil, the Gombak WTP had to be shut down for four days for cleaning-up purposes. Accordingly, Puncak Niaga could not supply treated water to Syabas. In turn, Syabas was unable to distribute treated water to its consumers. The plaintiffs' position was that the first defendant was solely (100%) liable because the first defendant's tanker had rammed into the rear of the second defendant's tanker. The driver of the first defendant's tanker ('Mohd Rosli') had pleaded guilty to inconsiderate driving under s 43(1) of the Road Transport Act 1987. The issued arising for determination were: (i) whether the spillage of the crude palm oil caused the contamination of Sungai Gombak and the Gombak intake; (ii) who was liable for the collision; (iii) whether it was reasonably foreseeable or whether the defendants could reasonably foresee that the oil spillage onto the highway due to the collision would result in the contamination of the Gombak intake; (iv) whether Puncak Niaga was negligent in not taking any measures to prevent contamination of Sungai Gombak and the Gombak intake by putting up warning notices or signages to inform the public of the presence of a water catchment area (Sungai Gombak) at KM 28 of the highway; and (v) What was the quantum of damages suffered by the plaintiffs.

Held, allowing the plaintiffs' claims with costs:

(1) The fact that the contamination at the water catchment area was caused by the crude palm oil spillage as a result of the collision was not disputed (see para 21).

(2) The fact that there were road works being carried out along the highway at the material time should have alerted Mohd Rosli to be more cautious and careful when approaching the said area. Based on the evidence, the first defendant was solely negligent (100%) liable for causing the collision with the second defendant's tanker (see para 26).

(3) Since Sungai Gombak had been published in the official *gazette*, *Warta Kerajaan PU (A) 12, Jil 23 No 3* as a water catchment area under the fourth Schedule of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 under the Environmental Quality Act 1974, (P3), the law imposes a statutory duty upon the public, in this case, the first defendant, not to pollute Sungai Gombak. The statutory duty imposed includes placing any waste into the inland waters through a negligent conduct (in the instant case the negligent driving by the first defendant which led to the collision and the oil spillage resulting in the contamination of Sungai Gombak). By publication in the official gazette, it constituted sufficient notice in that the law presumes that the public and the first defendant were deemed to have notice of the existence and location of the water catchment area situated at KM 28 of the highway. The defence by the first defendant that they did not have any knowledge of the whereabouts of the water catchment area along the highway was no

defence at all since ignorance of the law is not a valid defence (see paras 38 & 51).

(4) The losses suffered by the plaintiffs was a direct consequence from the negligent conduct of the first defendant's driver in causing the collision with the second defendant's tanker resulting in the crude palm oil carried by both tankers to spill onto the highway and flowing into the drainage system and into Sungai Gombak and the Gombak intake (see para 52).

(5) The first defendant owed a duty of care towards the plaintiffs and they had breached their duty of care. The first defendant could reasonably foresee that their negligent act in causing the collision would result in the oil spillage contaminating and polluting the Gombak river and the Gombak intake located nearby, causing losses and damages to the plaintiffs who were relying on Sungai Gombak as their means of business. As such, the first defendant was wholly liable for damages suffered by the plaintiffs (see para 54).

(6) With regard to the issue of whether Puncak Niaga was guilty of contributory negligence for not putting any signages along the highway to inform highway users of the location of the water catchment area and for not installing any form of mechanism to minimise the risk of an oil spillage at the highway, the principles of contributory negligence was not applicable to the first plaintiff as it was the first defendant's negligent conduct in causing the collision and the spillage that was instrumental in causing the harm. The first defendant was the sole contributor to the contamination (see paras 55 & 58).

(7) The person who is claiming for such damages has to strictly prove the damages in court. Both Puncak Niaga and Syabas claims for special damages were not supported by independent documents. Be that as it may, even though the plaintiffs had failed to prove their claim for special damages, nominal damages can still be awarded to the plaintiffs as it can be reasonably presumed that the plaintiffs had suffered from certain amount of losses as a result of the breach by the first defendant. Hence, the court awarded nominal damages of RM50,000 to Puncak Niaga and RM75,000 to Syabas (see paras 61, 63 & 69).

[Bahasa Malaysia summary

Plaintif pertama ('Puncak Niaga') merupakan pengendali loji rawatan air, iaitu Loji Rawatan Air Gombak ('Gombak WTP'). Air mentah daripada Gombak WTP datang dari sungai iaitu Sungai Gombak ('pengambilan dari Gombak'). Pengambilan dari Gombak terletak di KM28 Lebuhraya Kuala Lumpur-Karak ('Lebuhraya tersebut'). Sungai Gombak *digazetkan* sebagai kawasan penakungan air sebelum ia melepasi loji rawatan air yang dikendalikan oleh Syabas di Gombak WTP. Plaintif kedua ('Syabas') merupakan penyalur air yang telah dipulihkan. Syabas membeli air yang telah dirawat daripada

Gombak WTP daripada Puncak Niaga untuk diedarkan kepada pengguna-pengguna di Gombak. Plaintif-plaintif menuntut ganti rugi daripada defendan-defendan bagi kos dan kerugian yang mereka alami akibat pencemaran Sungai Gombak yang diakibatkan oleh pelanggaran di KM29.2 lebuh raya melibatkan tangki minyak defendan-defendan, No BCY 4383 dan DAN 4669, yang masing-masing dipandu oleh pemandu-pemandu defendan pertama dan kedua. Akibat pelanggaran tersebut, minyak sawit mentah yang dibawa oleh kedua-dua tangki tumpah ke atas lebuh raya dan mengalir ke sistem perparitan sepanjang lebuh raya menuju Sungai Gombak. Akibat pencemaran Sungai Gombak oleh minyak sawit mentah, Gombak WTP terpaksa ditutup selama empat hari bagi tujuan pembersihan. Dengan itu, Puncak Niaga tidak dapat menyalurkan air ke Syabas. Seterusnya, Syabas tidak dapat menyalurkan air kepada pengguna-penggunanya. Hujahan plaintif-plaintif adalah bahawa defendan pertama bertanggungan sepenuhnya (100%) kerana tangki defendan pertama telah melanggar bahagian belakang tangki defendan kedua. Pemandu tangki defendan pertama ('Mohd Rosli') mengaku bersalah kerana memandu dengan cuai di bawah s 43(2) Akta Pengangkutan Jalan 1987. Isu yang berbangkit bagi pemutusan adalah sama ada tumpahan minyak sawit mentah telah menyebabkan pencemaran Sungai Gombak dan pengambilan dari Gombak; siapakah yang bertanggungjawab bagi pelanggaran; sama ada boleh dijangka secara munasabah atau defendan-defendan boleh menjangka secara munasabah bahawa tumpahan minyak di lebuh raya akan menyebabkan pencemaran di pengambilan dari Gombak; sama ada Puncak Niaga cuai dengan tidak mengambil apa-apa tindakan untuk mengelakkan pencemaran Sungai Gombak dan pengambilan dari Gombak dengan meletakkan notis-notis atau tanda-tanda untuk memaklumkan orang awam akan adanya kawasan takungan air (Sungai Gombak) di KM28 lebuh raya; dan apakah kuantum kerugian yang dialami oleh plaintif-plaintif.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos:

(1) Fakta bahawa pencemaran di kawasan takungan air disebabkan oleh tumpahan minyak sawit mentah akibat pelanggaran tidak dipertikaikan (lihat perenggan 21).

(2) Fakta bahawa terdapat kerja-kerja pembaikan jalan yang dijalankan sepanjang lebuh raya pada masa material sepatutnya membuat Mohd Rosli lebih waspada dan berhati-hati apabila menghampiri kawasan tersebut. Berdasarkan keterangan, defendan pertama bertanggungan cuai sepenuhnya (100%) kerana menyebabkan pelanggaran dengan tangki defendan kedua (lihat perenggan 26).

(3) Oleh kerana Sungai Gombak telah diwartakan dalam *warta* rasmi *Warta Kerajaan PU(A) 12, Jil 23 No 3* sebagai kawasan takungan air di bawah Jadual Keempat Peraturan Kualiti Alam Sekeliling (Efluen Perindustrian

dan Kumbahan) 1979 di bawah Akta Kualiti Alam Sekeliling 1974 (P3), undang-undang mengenakan kewajipan statutori atas orang awam, dalam kes ini, defendan pertama untuk tidak mencemarkan Sungai Gombak. Kewajipan statutori yang dikenakan termasuklah meletakkan bahan-bahan buangan air pedalaman melalui tindakan cuai (dalam kes ini, pemanduan cuai oleh defendan pertama yang membawa kepada pelanggaran dan tumpahan minyak yang seterusnya mengakibatkan pencemaran Sungai Gombak). Dengan pewartaan dalam *warta* rasmi, ia membuktikan notis wajar di mana undang-undang menganggap bahawa orang awam dan defendan pertama dianggap mengetahui tentang kewujudan dan lokasi kawasan penakungan air yang bertempat di KM28 lebuh raya. Pembelaan defendan pertama bahawa mereka tidak mempunyai pengetahuan tentang tempat kawasan takungan air sepanjang lebuh raya bukanlah pembelaan sama sekali kerana kejahilan undang-undang bukanlah pembelaan yang sah (lihat perenggan 38 & 51).

(4) Kerugian yang dialami oleh plaintif-plaintif adalah kesan langsung daripada tindakan cuai pemandu defendan pertama dalam menyebabkan pelanggaran dengan tangki defendan kedua yang mengakibatkan minyak sawit mentah kedua-dua tangki tertumpah ke atas lebuh raya dan mengalir ke sistem perparitan dan ke dalam Sungai Gombak dan pengambilan dari Gombak (lihat perenggan 52).

(5) Defendan pertama mempunyai kewajipan berhati-hati terhadap plaintif-plaintif dan mereka telah melanggar kewajipan tersebut. Defendan pertama boleh menjangka secara munasabah bahawa tindakan cuai mereka dalama menyebabkan pelanggaran akan mengakibatkan tumpahan minyak yang mencemarkan Sungai Gombak dan pengambilan dari Gombak yang terletak berhampiran, menyebabkan kerugian dan kerosakan kepada plaintif-plaintif yang bergantung kepada Sungai Gombak sebagai sumber perniagaan mereka. Dengan itu, defendan pertama bertanggungan sepenuhnya bagi kerugian yang dialami oleh plaintif-plaintif (lihat perenggan 54).

(6) Berkenaan isu sama ada Puncak Niaga bersalah atas cuai sumbang kerana tidak meletakkan tanda-tanda sepanjang lebuh raya untuk memaklumkan pengguna-pengguna lebuh raya tentang lokasi pusat penakungan air dan kerana tidak meletakkan sebarang bentuk mekanisma untuk mengurangkan risiko tumpahan minyak di lebuh raya, prinsip cuai sumbang tidak terpakai kepada plaintif pertama kerana tindakan cuai defendan pertama dalam menyebabkan pelanggaran dan tumpahan memainkan peranan penting dalam menyebabkan kemudaratan. Defendan pertama merupakan satu-satunya penyumbang kepada kecuaian (lihat perenggan 55 & 58).

(7) Pihak yang menuntut bagi kerugian sedemikian hendaklah

membuktikan dengan ketat bagi kerugian di mahkamah. Tuntutan kedua-dua Puncak Niaga dan Syabas bagi ganti rugi khas tidak disokong oleh sebarang dokumen bebas. Namun begitu, walaupun plaintif-plaintif gagal membuktikan tuntutan mereka bagi ganti rugi khas, ganti rugi nominal masih boleh diawardkan kepada plaintif-plaintif kerana boleh dianggap secara munasabah bahawa plaintif-plaintif telah mengalami sejumlah kerugian akibat pelanggaran oleh defendan pertama. Dengan itu, mahkamah mengawardkan ganti rugi nominal sebanyak RM50,000 kepada Puncak Niaga dan RM75,000 kepada Syabas (lihat perenggan 61, 63 & 69).]

Notes

For cases on damages, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1209–1231.

For cases on duty of care, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1248–1334.

Cases referred to

Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 4 MLJ 1, FC (refd)

Donoghue v Stevenson [1932] AC 562 (refd)

East Suffolk Rivers Catchment Board v Kent & Anor [1941] AC 74, PC (refd)

Jaswant Singh v Central Electricity Board and Anor [1967] 1 MLJ 272 (refd)

Lochgelly Iron & Coal Company Ltd v M'mullan [1934] AC 1, PC (refd)

Loh Chiak Eong & Anor v Lok Kok Beng & Ors [2013] 1 MLJ 27, CA (distd)

Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan [1997] 5 MLJ 488, HC (refd)

Sarbanum Mahdi & Anor v Johnson Arul Arulsamy & Other cases [2009] 1 LNS 1218, HC (refd)

Sivakumaran & Others v Yu Pan & Anor [1995] 1 MLJ 12, HC (refd)

Sukatno v Lee Seng Kee [2009] 3 MLJ 306; [2009] 4 CLJ 171, CA (refd)

Syarikat Pertanian Emmal Sdn Bhd v Tractors Malaysia (1982) Sdn Bhd [2009] 4 MLJ 223; [2009] 10 CLJ 714, CA (refd)

Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd [2012] 2 MLJ 314; [2012] 1 CLJ 959, CA (folld)

Legislation referred to

Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 Fourth Schedule

Environmental Quality Act 1974 ss 2, 25

Interpretation Acts 1948 And 1967 s 18(2)

Road Transport Act 1987 s 43(1)

Water Supply Enactment 1997

Shanti Supramaniam (Adrian See Joo Hong and Nurain Kamaruzaman with her) (Belden) for the plaintiff.
Viknesh Selvanathan (Saifuddin Shahrudin with him) (Atma Singh Veriah & Co) for the defendent.

Suraya Othman J:

[1] The plaintiff, Puncak Niaga (M) Sdn Bhd ('Puncak Niaga') is a company in the business of operating 28 Water Treatment Plant, one of which is the Gombak Water Treatment Plant ('Gombak WTP'). The raw water for the Gombak WTP is solely derived from the river, Sungai Gombak ('the Gombak intake'). The Gombak intake is locate at KM28 of Kuala Lumpur-Karak Highway.

[2] The second plaintiff, Sykt Bekalan Air Selangor ('Syabas') is a company in the business of distributing treated water to the consumers in the State of Selangor, Federal Territory of Kuala Lumpur and Putrajaya which includes Gombak. Syabas purchases treated water from the Gombak WTP from Puncak Niaga to be supplied to the consumers in Gombak.

[3] The plaintiffs' Puncak Niaga and Syabas are claiming for damages from the defendants for expenses and losses they suffered as a result of contamination of Sungai Gombak located across KM 28 of the Kuala Lumpur-Karak Highway. Sungai Gombak has been gazetted as a water catchment area before it goes through to the water treatment plant operated by Syabas at Gombak WTP. The plaintiffs alleged that the contamination was caused mainly by a collision at KM 29.2 on the highway on 9 September 2005 involving the defendants oil tankers, numbers BCY 4383 and DAN 4669, respectively driven by the first and second defendants' servant or agent.

[4] As a consequence of the collision, crude palm oil which was carried by both tankers had spilled into the highway and flowed into the drainage system along the highway towards Sungai Gombak. Due to the contamination or pollution of Sungai Gombak by crude palm oil, the Gombak WTP had to be shut down for four days from 9 September 2005–13 September 2005 for cleaning-up purposes. Accordingly, Puncak Niaga could not supply treated water to Syabas. In turn, Syabas was unable to distribute treated water to its consumers.

[5] The second defendant did not attend court and the plaintiffs obtained judgment in default ('JID') against them on 29 May 2006. The JID ordered that damages as claimed by the plaintiffs against the second defendant are to be assessed at trial. The plaintiffs' position is that the first defendant is solely (100%) liable because the first defendant's tanker, BCY 4383 rammed into the

rear of the second defendant's tanker, DAN 4669.

[6] Trial then proceeded against the first defendant and a total of seven witnesses were called: five for the plaintiffs and two for the first defendant. After hearing the testimonies of the witnesses and submissions by both parties I found that the first defendant is solely (100%) liable for the losses suffered by the plaintiffs. As for damages, I awarded nominal damages of RM50,000 out of RM115,923.80 claimed in the statement of claim, to Puncak Niaga and RM75,000 out of RM190,442 claimed, to Syabas. The first defendant, dissatisfied, then filed an appeal against my decision.

FACTS OF THE CASE

[7] Puncak Niaga is in the business of water treatment and operates 28 water treatment plants including the Gombak water treatment plant ('Gombak WTP'). The raw water for the Gombak WTP is derived solely from the river, Sungai Gombak ('Gombak intake') which is located at KM 28 of the Kuala Lumpur-Karak Highway. The Gombak WTP is located 12 km downstream from the water intake location.

[8] Syabas is in the business of distributing treated water. Syabas has entered into a concession agreement dated 15 December 2004 with the Government of Malaysia and the State Government of Selangor, and is also a licensee under the Water Supply Enactment 1997 whereby Syabas is empowered to provide or supply treated water to the consumers in Selangor, Federal Territory of Kuala Lumpur and Putrajaya which includes the areas in Gombak. Syabas purchases treated water from the Gombak WTP to be supplied to the consumers in Gombak.

[9] On 9 September 2005 at about 2pm a collision occurred between the first defendant's tanker, registration number BCY 4383 and the second defendant's tanker, registration number DAN 4669. The collision occurred at KM 29.2 of the Kuala Lumpur-Karak Expressway with both the tankers heading toward Kuala Lumpur. Both the tankers at the material time were carrying crude palm oil. As a result of the collision, crude palm oil that was carried by both tankers had spilled onto the highway.

[10] The oil spillage at the highway had flowed into the highway drainage system and into Sungai Gombak, contaminating and polluting the river, including the Gombak intake.

[11] The contamination of the crude palm oil at the water catchment area was first spotted at about 2pm by Puncak Niaga's employee, Mr Abdul Aziz bin Ahmad who later informed PW1, Mr Ismail bin Hassan, the then regional manager for the central region.

[12] PW1 immediately instructed Abdul Aziz Ahmad to shut down its Gombak WTP at about 2.15pm on the same day to prevent the contaminated water from entering the water treatment plant. As the amount of crude palm oil that had contaminated the water catchment area was substantial, no immediate action could be taken to stop the contamination at that time.

[13] In order to mobilise cleaning-up operation, Puncak Niaga had to shut down its water treatment operation for 99.75 hours, which is equivalent to four days from 2pm on 9 September 2005 until 6pm on 13 September 2005.

[14] Puncak Niaga thus claims against the defendants the sum of RM115,923.80 for expenses and losses they suffered due to the shutting down of the Gombak WTP for four days and the cost incurred in mobilising manpower to clean-up the crude palm oil from Sungai Gombak and the Gombak intake area as a result of the oil spillage caused by the collision between the defendants' tankers.

[15] As Puncak Niaga had ceased its water treatment plant operation for four days for cleaning-up purposes, it was unable to supply treated water to Syabas, who in turn was unable to supply and sell treated water to the consumers in the affected areas. Thus, Syabas claims against the defendants the sum of RM190,442.84 being the costs for installing by-pass pipes, hiring water tankers to transport clean water to the affected areas and the loss of revenue or profit due to its inability to sell treated water to the consumers for four days due to the shutting down of the Gombak WTP.

[16] As a result of the collision on 9 September 2005, the driver of the first defendant's tanker, Mr Mohd Rosli bin Abdul Rahim was charged for inconsiderate driving under s 43(1) of the Road Transport Act 1987 ('Act 333'). He pleaded guilty to the charge and was fined RM4,500 by the magistrate.

THE PLAINTIFF'S SUBMISSION

[17] The plaintiffs were represented by Ms Shanti Supramaniam assisted by Mr Adrian See Joo Hong and Ms Nurain Kamaruzaman. Among the submissions made by them are:

(a) based on the damage to the first defendant's tanker, the spillage of crude palm oil onto the highway resulting in Sungai Gombak and the Gombak intake to be contaminated or polluted was caused by the first defendant's driver who had negligently rammed into the rear of the second defendant's tanker;

(b) the defendants whom at the time of the accident were carrying crude palm oil owed a duty of care, as road users, in that they were aware that it would be dangerous if crude palm oil escapes from their tankers onto the highway;

(c) the location where the collision occurred at KM 29.2 had been *gazetted* as a water catchment area in which a statutory duty is imposed by law upon the defendants, a duty of care, to the plaintiffs who are relying on the water catchment as their means of business;

(d) the imposition of the statutory duty therefore imposed a duty of care upon the defendants, in that, they could have foreseen that the plaintiffs would be put to expense and suffer losses if the water catchment area was polluted with crude palm due to their negligence;

(e) as the area had been *gazetted*, the public is deemed to have notice of the existence of the water catchment area and therefore it is foreseeable that the plaintiffs would suffer losses if the area becomes polluted by the spillage of crude palm oil due to the negligence of the defendants.

THE DEFENDANT'S SUBMISSION

[18] The first defendant was represented by Mr Viknesh Selvanathan, assisted by Mr Saifuddin Shahrudin. Among the submissions made by them are:

(a) the collision was not caused solely by the first defendant but as a result of the surrounding circumstances at the time when the collision occurred: that is, the act by the second defendant's driver who had suddenly stopped and the road condition at that material time in which only one out of three lanes were opened to traffic due to construction works being carried out by the highway management;

(b) Puncak Niaga had failed to erect any notices or signages along the highway to inform road users of the existence of a water catchment area along the highway. The first defendant did not have any knowledge of the existence of the water catchment area along the highway. For that reason, the first defendant owed no duty of care towards the plaintiffs as the first defendant could not be expected to foresee that the oil spillage due to the collision would result in the contamination or pollution of the water catchment area and that the plaintiffs will be put to expense and will suffer losses as a consequence.

(c) Puncak Niaga had also failed to install any safety mechanism to prevent contamination or pollution due to oil spillage to Sungai Gombak. A similar incident of contamination of Sungai Gombak from oil spillage had occurred in 2002 as a consequence of a road accident on the highway and Puncak Niaga should have been alerted and taken precautionary measures to prevent such an incident from happening again; and

(d) the first defendant only owes a duty of care towards other road users on the highway but not to the plaintiffs.

ISSUES TO BE TRIED

[19] Parties filed a statement of issues to be tried before the court and they are reproduced below:

(a) whether the collision on 9 September 2005 at KM 29 of the Kuala Lumpur-Karak Highway, between tankers number BCY 4383 and DAN 4669 each carrying approximately 30 metric tons of crude palm oil was caused by the negligence of the first and/or second defendants;

(b) whether it is reasonably foreseeable that the plaintiffs will suffer losses and damages due to the negligence of the first and/or second defendants;

(c) whether the first plaintiff was negligent in locating the Gombak intake at KM 28 of the Kuala Lumpur-Karak Highway;

(d) whether the first plaintiff knew or could foresee that spillages occurring as a result of vehicle collisions will flow into the Gombak intake;

(e) was the first plaintiff negligent in not taking steps to prevent oil, pollutants and other contaminations from entering the Gombak intake and thus into the treatment plant;

(f) was the first plaintiff under a duty to ensure that oil, pollutants and other contaminants did not enter the Gombak intake;

(g) was the first plaintiff obliged to provide notices that the Gombak intake was located at KM 28 of the Kuala Lumpur-Karak Highway;

(h) whether the first plaintiff contributed to the contamination and pollution of Sungai Gombak;

(i) if the first and/or second defendant(s) is/are found negligent in causing the crude palm oil to spill onto/into the Gombak intake, what is the quantum of damages suffered by the plaintiffs as a result thereof.

DECISION

[20] There are five core issues in this case:

(1) whether the spillage of crude palm oil onto the highway due to the collision of the defendants tankers at KM 29.2 caused the contamination or pollution of the river, Sungai Gombak and the Gombak intake located at KM 28 of the Kuala Lumpur-Karak Highway;

(2) who was liable for the collision: whether the first defendant is solely negligent (100%) liable or whether the second defendant is equally negligent and liable and, if so, at what percentage;

(3) whether it was reasonably foreseeable or whether the defendants could reasonably foresee that the oil spillage onto the highway due to the collision would result in the contamination or pollution of the river, Sungai Gombak and the Gombak intake;

(4) whether Puncak Niaga is negligent in not taking any measures to prevent contamination or pollution of Sungai Gombak and the Gombak intake, that is, by putting up warning notices or signages to inform the public of the presence of a water catchment area (Sungai Gombak) at KM 28 of the highway; and

(5) if the defendants were negligent in causing the contamination or pollution of Sungai Gombak and the Gombak intake, what is the quantum of damages suffered by the plaintiffs as a result thereof.

ISSUE OF LIABILITY

1. Whether the spillage of crude palm oil onto the highway due to the collision of the defendants tankers at KM 29.2 caused the contamination or pollution of the river, Sungai Gombak and the Gombak intake located at KM 28 of the Kuala Lumpur-Karak Highway

[21] The fact that the contamination at the water catchment area was caused by the crude palm oil spillage as a result of the collision was not disputed by the first defendant during trial. Testimonies from DW1, Mr Lee Gee Yong, confirmed that the amount of crude palm oil carried by the first defendant's tanker before the collision was 25.5 tons while the amount of crude palm oil that was salvaged from the collision and returned back to its supplier was 13.5 tons. Thus 12 tons of crude palm oil had spilled onto the highway from the first defendant's tanker and flowed into the drainage system of the highway. Looking at the sequence of events; at the time when Puncak Niaga's employee, Mr Abdul Aziz Ahmad had first spotted the oil spillage at the water catchment area at about 2pm and the time of the collision, also about 2pm, it is very probable that the contamination at the water catchment area of Sungai Gombak and the Gombak intake was caused by the oil spillage from the defendants' tankers as a result of the collision.

[22] Thus having identified the cause of the pollution of the water catchment area, that is the oil spillage from the defendants tankers, the second issue that needed to be determined here is *who was liable for the collision; whether the first defendant is solely (100%) liable as submitted by the plaintiffs or the second defendant is also equally liable, and if so, at what percentage*.

[23] The plaintiffs had brought this action against the defendants based on the premise that the accident or collision involving both the defendants tankers had resulted in crude palm oil from both tankers spilling out onto the highway, seeping into the drainage system and later contaminating Sungai Gombak that has been *gazetted* as a water catchment area located downstream the highway.

[24] The first defendant in their defence raised several arguments in which they argued that liability should not be solely theirs but be apportioned among the two defendants. Among the arguments that were raised by the first defendant are as follows:

(a) the accident was caused by the second defendant's tanker which had suddenly stopped in front of the first defendant's tanker as a result of which the first defendant's driver had to apply its emergency brake and swerved its tanker in order to avoid collision with the second defendant's tanker. As a consequence, the first defendant's tanker had rammed into the second defendant's tanker and a steamroller parked at the side of the highway;

(b) at the time of the accident, only one out of three lanes were opened to road users or traffic as the highway management company was conducting road works at that time; and

(c) there were no notices, warning signs or signages erected along the highway informing road users of the construction works along the highway.

[25] During the course of the trial, PW4, Sergeant Nasirudin bin Murad who is the investigating officer ('IO') testified that the accident was caused by tanker number BCY 4383 driven by the first defendant's driver, Mohd Rosli bin Abdul Rahim who had rammed the second defendant's tanker number DAN 4669 which had caused the first defendant's tanker to skid to the right and ramming into a steamroller parked along the highway. As a consequence, the first defendant's driver, Mohd Rosli bin Abdul Rahim was charged under s 43(1) of the Road Transport Act 1987 ('Act 333') for inconsiderate driving. He pleaded guilty and was fined RM4,500 by the magistrate. PW4 also confirmed that there were construction works being carried out on the highway at the material time and there was only one out of three lanes that were opened to traffic. His investigation also revealed that Mohd Rosli's version in his police report of how the accident occurred which mentioned about a car that had

suddenly stopped in front of his tanker necessitating him to apply the emergency brake and swerved his tanker in order to avoid the car in front and then colliding into the second defendant's tanker is not corroborated and is a mere fabrication on the part of Mohd Rosli. According to PW4, the car mentioned by Mohd Rosli did not exist at all at the material time.

[26] With due respect to the first defendant's counsel, Mr Vicknesh Selvanathan, I am of the view that the fact that were road constructions or road works being carried out along the highway at the material time should have alerted Mohd Rosli to be more cautious and careful when approaching the said area.

[27] In the case of *Sarbanum Mahdi & Anor v Johnson Arul Arulsamy & Other cases* [2009] 1 LNS 1218, it was held that:

> It is therefore unjust for Plaintiffs to contend that the Kancil and Volvo drivers are negligent in these accidents. The accident in the instant appeal was due to the first plaintiffs own negligence. There is no evidence to prove any negligence on the part of the Kancil driver or the Volvo driver. The Plaintiff has no right to claim that the other drivers or any other road users had to comply with Rule 25 of the Highway Code or Rule 4 of the Road Traffic Rules 1959 in order to condone her own negligence. Is the first Plaintiff saying that when she was overtaking and even encroaching onto the opposite side of the road of other on-coming vehicles, everyone must move to the side, slow down, apply brakes, stop etc, to enable her to move freely ahead; otherwise all of them would be liable and would have contributed negligence to her accident? That certainly can never be the intent of the Highway Code and the Road Traffic Rules. First Plaintiff does not have that right over all others. *She had forgotten entirely of her fundamental duty as a road user to care for her own safety as well as the safety of others on the road*. The accident happened when all 3 vehicles were so near to one another that no reasonable careful man would fairly be expected to take any precaution to avoid the accident. This aspect of the submission has no merit. (Emphasis added.)

[28] Thus based on the evidence of PW4 and the facts of the case, I am of the view that the first defendant is solely negligent (100%) liable for causing the collision with the second defendant's tanker at Km 29.2 of the Kuala Lumpur-Karak highway.

3. Whether it was reasonably foreseeable or whether the first defendant could reasonably foresee that the oil spillage onto the highway due to the collision would result in the contamination or pollution of the river, Sungai Gombak and the Gombak intake

[29] The plaintiff's claim is based on the law of torts whereby the main issue that needed to be determined is whether the claim fulfilled the requirement of the neighbourhood principle as set out in the landmark case of *Donoghue v*

Stevenson [1932] AC 562 where it was held that:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; *and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*.

[30] The first defendant in his defence raised the following grounds in denying liability against the plaintiffs:

(a) Puncak Niaga had failed to erect notices, warning signs or signages informing road users of the existence of a water catchment area along the highway;

(b) the first defendant did not have any knowledge of the existence of the water catchment area along the highway. For that reason, the first defendant owed no duty of care towards the plaintiffs as it is not reasonably foreseeable that the plaintiffs would suffer from any losses due to oil spillage onto the highway;

(c) Puncak Niaga had also failed to take any measures to install protective mechanism to prevent oil spillage onto the highway from contaminating Sungai Gombak. This is so since a similar incident due to an accident on the highway had occurred before in 2002 resulting in the contamination and pollution of Sungai Gombak; and

(d) the first defendant only owes a duty of care towards other road users along the highway but not the plaintiffs.

[31] As such, the first defendant argued that they should not be held liable as the losses suffered by the plaintiffs were not reasonably foreseeable.

[32] Puncak Niaga's counsel, Ms Shanti Supramaniam in countering the first defendant's argument, tendered *Warta Kerajaan PU (A) 12, Jil 23* through PW2, Mr Mohd Hafiz bin Md Yunos, the regional manager of the central region and argued that Sungai Gombak had been *gazetted* as a water catchment area under the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 and it is an offence for waste or pollutants to be discharged into any inland waters under s 25 of the Environmental Quality Act 1974 ('Act 127').

[33] Section 25 states as follows:

> Section 25 Restrictions on pollution of inland waters.

(1) *No person shall, unless licensed, emit, discharge or deposit any environmentally hazardous substances, pollutants or wastes into any inland waters* in contravention of the acceptable conditions specified under section 21.

(2) Without limiting the generality of subsection (1), a person shall be deemed to emit, discharge or deposit wastes into inland waters if

(a) he places any wastes in or on any waters or in a place where it may gain access to any waters;

(b) he places any waste in a position where it falls, descends, drains, evaporates, is washed, is blown or percolates or is likely to fall, descend, drain, evaporate or be washed, be blown or percolated into any waters, or *knowingly or through his negligence, whether directly or indirectly, causes or permits any wastes to be placed in such a position*; or

(c) he causes the temperature of the receiving water to be raised or lowered by more than the prescribed limits.

(3) *Any person who contravenes subsection (1) shall be guilty of an offence* and shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been served upon him.

(Emphasis added.)

[34] Inland waters are defined in s 2 of the Act as follows:

2 Interpretation

'inland waters' means any reservoir, pond, lake, river, stream, canal, drain, spring or well, or any part of the sea above the low water line along the coast, or any other body of natural or artificial surface or subsurface water;

[35] The first defendant's counsel, Mr Viknesh Selvanathan contended that it is impossible for him to know that there is a water catchment area along the highway and that the water catchment area had been *gazetted* under the law.

[36] The answer to Mr Vicknesh Selvanathan contention is simple. Ignorance of the law is no excuse and the effect of a *gazette* has been decided in the case of *Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 4 MLJ 1, where it was held that if a law has been *gazetted*, the public are deemed to have notice of the same.

It is also to be noted that the 1993 Regulations is a federal law and duly *gazette* under PU(A) 395. *As it is a law duly gazette, the public are deem to have notice of the same*. Therefore in our view in the present case the appellant as a public officer from service pursuant to reg 28(1) of the 1993 Regulations is presumed to know his rights

under the 1993 Regulations. (Emphasis added.)

[37] Further, in s 18(2) of the Interpretation Acts 1948 And 1967 ('Act 388'), it prescribes as follows:

Section 18 Gazette

(1) The Gazette shall be published in parts as follows:

(a) a part to be known as the Acts Supplement which shall be published as and when necessary and which shall contain all Acts of Parliament and all Ordinances promulgated by the Yang di-Pertuan Agong;

(b) a part to be known as the Legislative Supplement A which shall be published as and when necessary and which shall contain all Royal Proclamations, orders, rules, regulations and by-laws;

(c) a part to be known as the Legislative Supplement B which shall be published as and when necessary and which shall contain all subsidiary legislation other than that which is required to be published in the Legislative Supplement A;

(d) a part to be known as the Bills Supplement which shall be published as and when necessary and which shall contain all Bills;

(e) a part which shall contain all matter which is required to be published in the Gazette or which the Government deems it necessary to publish for general information other than matter which this subsection requires to be published in the other parts;

[(1)(e) Subs Act A 1330 s 3]

(2) *Publication in the official Gazette of Malaysia shall constitute sufficient notice of any matter* required to be published in the Gazette by or under any federal law or required to be published in the Sabah Government Gazette or the Sarawak Government Gazette by or under any enactment of those States which has been declared to be a federal law.

(3) Where any matter is of local application only and is issued under the authority of a State officer or any person in the State having authority to do so under federal law it shall constitute sufficient notice thereof if the matter is published in the official gazette of the State concerned.

(4) Where the Gazette is published in more than one form, the date of publication of the Gazette shall be deemed to be the date the Gazette is first published in any form.

(Emphasis added.)

[38] Thus since Sungai Gombak had been published in the official *gazette*, *Warta Kerajaan PU (A) 12, Jil 23 No 3* as a water catchment area under the Fourth Schedule of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 under the Environmental Quality Act 1974 (P3),

A the law imposes a statutory duty upon the public, in this case, the first defendant, not to pollute Sungai Gombak. The statutory duty imposed includes placing any waste into the inland waters through a negligent conduct (in our instant case the negligent driving by the first defendant which led to the collision and the oil spillage resulting in the contamination of Sungai B Gombak). By publication in the official *gazette*, it constitute sufficient notice in that the law presume that the public and the first defendant are deemed to have notice of the existence and location of the water catchment area situated at KM 28 of the highway.

C

[39] In the case *Lochgelly Iron & Coal Company Ltd v M'mullan* [1934] AC 1, it was held by the Privy Council held that:

> It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute; it is equally imperative in either case, and in either case D it is a duty imposed by law. I am afraid I fail to understand the argument that an employer who is enjoined by statute to take particular precautions for the safety of his employees is not guilty of negligence if one of his employees is injured through the employer's failure to take the precautions prescribed, merely because the duty to take those precautions has been imposed by statute and does not or may not arise at E common law. Such a doctrine is, in my opinion, no part of the law of Scotland.

[40] This principle had been followed by the Malaysian court in the case of *Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara-Selatan* [1997] 5 MLJ 488.

F

[41] The imposition of a statutory duty on the public also gives the right to any person who suffers from any losses as a result of the breach of that statutory duty a right to claim for damages by civil action.

G

[42] In the case of *East Suffolk Rivers Catchment Board v Kent & Anor* [1941] AC 74, the Privy Council ruled that:

> The duty imposed by statute is primarily a duty owed to the State. Occasionally penalties are imposed by the statute for breach; and, speaking generally, in the H absence of special sanctions imposed by the statute for breach of duty amounts to a common law misdemeanor. The duty is not necessarily a duty owed to a private citizen. The duty may, however, be imposed for the protection of particular citizens or class of citizens, in which case a p erson of the protected class can sue for injury to him due to the breach.

I

[43] In the case of *Jaswant Singh v Central Electricity Board and Anor* [1967] 1 MLJ 272, it was held that:

> This does not mean, of course, that the plaintiff must be a person identifiable by the defendant. What is required is that he should be one of a class within the area of foreseeable injury.

[44] The first defendant argued that they should not be held liable for the losses suffered by the plaintiffs as the losses are not reasonably foreseeable and that they are not in a position of legal proximity or neighbourhood with the plaintiffs in that the losses that were suffered by the plaintiffs were something that is not within the reasonable contemplation of the first defendant at the time when the first defendant was driving along the highway on 9 September 2005.

[45] The first defendant relies on to the judgment of the Court of Appeal in the case of *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27, whereby the following passage was cited by the Court of Appeal when discussing whether the court should extend the principle of duty of care as propounded in *Donoghue v Stevenson*:

> [57] In the House of Lord's case of *Caparo Industries plc v Dickman* (a case that we have mentioned earlier) Lord Bridge of Harwich summarised the principle on duty of care as follows:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable and that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[46] With due respect, the issue in *Loh Chiak Eong & Anor* involves the issue of whether an architect (the appellants in that case) owed a duty of care to the purchaser when there was a delay by them in obtaining the certificate of fitness for occupation ('CFO') as a result of which the plaintiffs had suffered from financial losses.

[47] In that case, the respondent had entered into an agreement with the developer to purchase an industrial building constructed by the developer. The initial plan prepared by the appellant was approved by the local authority on 20 December 1994 on condition that the requirements of the Department of Environment ('DOE'), in particular the provisions of the Environmental Quality (Industrial Effluent and Discharge) Regulations 1979 must be complied with.

[48] The developer had proceeded with the construction of the Central Effluent Industrial Treatment System ('the CEITS') as part of the terms under the sale and purchase agreement. However the construction was done not to the satisfaction of the Department of Environment. Due to the non-approval by the DOE, the appellant refused to apply for CFO despite instruction by the developer to do so. The architect later resigned as the architect in the said project. As a result there was a delay in the issuance of the CFO for the respondent's industrial building.

[49] The Court of Appeal in that case reversed the decision of the High Court and ruled that the architect did not owe any duty of care to the respondents as the responsibility to obtain the CFO was on the developer and not the architect. The architect being an agent appointed by the developer is only liable to the developer but not the purchaser.

[50] I am of the view that the facts in our instant case can be distinguished with the facts in *Loh Chiak Eong*, where in the present case the first defendant is in direct relationship with the plaintiffs and they are under a statutory duty not to pollute Sungai Gombak which had been *gazetted* as a water catchment area.

[51] The defence by the first defendant that they do not have any knowledge of the whereabouts of the water catchment area along the highway is no defence at all since ignorance of the law is not a valid defence. The first defendant is deemed to have knowledge of the existence of a water catchment area as it has been so *gazetted* under the law.

[52] Further, the losses suffered by the plaintiffs is a direct consequence from the negligent conduct of the first defendant's driver in causing the collision with the second defendant's tanker resulting in the crude palm oil carried by both tankers to spill onto the highway and flowing into the drainage system and into Sungai Gombak and the Gombak intake. The impact it caused were immediate in that it took less than ten minutes for the crude palm oil to reach the water catchment area which is located 3km downstream the highway.

[53] In the case of *Sivakumaran & Others v Yu Pan & Anor* [1995] 1 MLJ 12, the court made a finding as follows with regard to the principles of damages:

> As regards damage in consequence of a breach of a duty to take care, the fundamental rule is that the injury suffered by the plaintiff must not be too remote a consequence of the defendants' conduct, or, as it is often said, the damage must not be too remote. In this connection, on the authority of the decision of the Court of Appeal in England in the case of *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 KB 560, the rule was that if a reasonable man would have foreseen any damage to the plaintiff as likely to result from the defendant's act, then he was liable for all

direct consequences of it suffered by the plaintiff whether a reasonable man would have foreseen them or not, that is, if they were directly traceable to the act and not due to the operation of independent intervening causes. That rule was abrogated by the Judicial Committee of the Privy Council in the case of *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (The Wagon Mound), in which it was decided that 'the essential factor in determining liability is whether the damage is of such kind as the reasonable man should have foreseen', and that it is wrong to use one test (reasonable foreseeability) to determine culpability, ie duty and breach of duty, and a different test (directness) to determine remoteness of damage. In other words, the test of remoteness is to be treated as being identical with the test of negligence. The test of duty is foreseeability of some damage to the plaintiff. The test of damage is that the kind and the extent of plaintiff's damage should have been foreseeable in general outline.

[54] Thus, based on the above reasons, I find that the first defendant owed a duty of care towards the plaintiffs and that they had breached their duty of care. I also am of the view that the first defendant could reasonably foresee that their negligent act in causing the collision would result in the oil spillage contaminating and polluting the Gombak river and the Gombak intake located nearby, causing losses and damages to the plaintiffs who are relying on Sungai Gombak as their means of business. As such I find the first defendant wholly liable for damages suffered by the plaintiffs.

4. Whether Puncak Niaga is negligent in not taking any measures to prevent contamination or pollution of Sungai Gombak and the Gombak intake, that is, by putting up warning notices or signages to inform the public of the presence of a water catchment area (Sungai Gombak) at KM 28 of the highway

[55] With regard to the issue of whether Puncak Niaga is guilty of contributory negligence for not putting any signages along the highway to inform highway users of the location of the water catchment area and for not installing any form of mechanism to minimise the risk of an oil spillage at the highway, I am of the view that since the first defendant is solely negligent for causing the collision, they should be wholly liable for the losses and damages suffered by the plaintiffs.

[56] In the case of *Sukatno v Lee Seng Kee & Anor* [2009] 3 MLJ 306; [2009] 4 CLJ 171, on the issue of contributory negligence, the Court of Appeal held as follows:

[50] Negligence is the failure to exercise care which the circumstances demand (*Glasgow Corporation v Muir And Others* [1943] AC 448 (HL) at 457; [1943] 2 All ER 44 at 48 (HL); and *Carmarthenshire County Council v Lewis* [1955] AC 549 (HL); [1955] 1 All ER 565 (HL)) and what amounts to negligence would depend on the facts of each particular case. Lord Dunedin aptly said in *Fardon v Harcourt-Rivington* [1932] All ER REP 81 at 83 (HL):

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. *If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.*

[57] In the latter part of the judgment, the Court of Appeal also ruled as follows:

> I have this to say. For the defendant to establish contributory negligence on the part of the plaintiff, the defendant has to prove that the plaintiff's negligence was the cause of the harm. According to *Viscount Simon in Boy Andrew (Owners) v St Rognvald (Owners)* [1948] AC 140 (HL)at 149; [1947] 2 All ER 350 (HL)at 351354, *the question to ask would not be related as to who had the last opportunity of avoiding the mischief but rather whose act was instrumental in causing the harm*. Sometimes a person may be found guilty of contributory negligence by his own act or omission just like, for instance, the failure of the motor cylist to wear crash helmet (*O 'Connell v Jackson* [1972] 1 QB 270 (CA); [1971] 3 All ER 129 (CA) or the failure to use the safety belt (*Froom And Others v Butcher* [1976] 1 QB 286 (CA); [1975] 3 All ER 520 (CA).

[58] For this reason, I am of the view that the principles of contributory negligence is not applicable to the first plaintiff as it was the first defendant's negligent conduct in causing the collision and the spillage of crude palm oil from the tankers onto the highway and consequently into Sungai Gombak and the Gombak intake that was instrumental in causing the harm, that is, the first defendant is the sole contributor to the contamination.

5. If the defendants were negligent in causing the contamination or pollution of Sungai Gombak and the Gombak intake, what is the quantum of damages suffered by the plaintiffs as a result thereof

[59] The claim by the plaintiffs are as follows:

Particulars of Puncak Niaga's claim

No.	Particular	Amount (RM)
i.	first plaintiff's personnel cost to clean up the	
	Gombak water intake area.	
	-Plant staff cost	7,140.87
	-HQ management cost	5,000.00
ii.	External (Orang Asli) cost to clean up Gombak water intake area	4,500.00
iii.	Cost of chemical used to clean up Gombak	

	river especially the Gombak water intake	
	area	
	(a) Activated carbon	7,953.75
	(b) Oil splitter	3,900.00
	(c) Degreasing solvent ND165	2,574.00
iv.	Oil boom	9,125.00
v.	Loss of revenue	70,230.18
vi.	Transportation of personnel to site	1,900.00
vii.	Equipment (High Pressure Water Pump)	1,200.00
viii.	Meals and refreshments for all staffs.	2,400.00
	Total	115,923.80

Particulars of Syabas's claim

No.	Particular	Amount (RM)
i.	Cost of water tankers and static water tankers	30,600.00
ii.	Labour cost	29,812.32
iii.	Cost of setting up bypass pipe	45,021.70
iv.	Cost of purchase of clean water	5,671.10
v.	Loss of revenue	39,246.15
vi.	On cost charge	38,088.57
vii.	Food and refreshment for all staffs	2,003.00
	Total	190,442.84

[60] It was submitted by the plaintiffs that the first defendant had failed to challenge the evidence given by the plaintiffs' witnesses with regard to the claim for special damages by the plaintiffs. For that reason, the evidence by the plaintiffs' witnesses should be accepted and the plaintiffs should be awarded the full amount of damages claimed.

[61] The law with respect to a claim for special damages is clear in that the person who is claiming for such damages has to strictly prove the damages in court. However in the case of *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 2 MLJ 314; [2012] 1 CLJ 959, Justice Hishamudin Mohd Yunus JCA, in his judgment for the Court of Appeal held that:

> [93] In respect of claims for damages, we agree with the learned judge thai the burden is on the appellant to prove the damages claimed. We need only refer to the judgment of Ong Hock Thye FJ in the case of *Guan Soon Tin Mining Company v Wong Fook Kum* [1968] 1 MLJ 99; [1968] 1 LNS 43 wherein His Lordship said, inter alia, as follows:

The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover.

Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178:

Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the Court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it. (Emphasis added.)

[62] First, Puncak Niaga had led evidence with regard to this issue through the testimony of PW2, Mr Mohd Hafiz bin Md Yunos, who was their regional manager. PW2 in his evidence testified that Puncak Niaga is relying on documents that had been prepared by their various departments which documents were compiled sometimes before the trial commenced. PW2 admitted during cross-examination that his testimony was solely based on the reports prepared and that he has no personal knowledge with regard to each and every item claimed.

[63] PW2 also confirmed that the computation done on the amount of losses suffered by Puncak Niaga was purely based on estimation and that they have no documents to tender to support their claim. Invoices and purchase orders that were referred to by PW2 in his testimony were dated long after the date of the incident. Purchases that were made such as for chemicals that were used during the cleaning-up operation of Sungai Gombak were based on the invoices admitted by PW2 as the cost Puncak Niaga had incurred in order to replace the stocks that were used on the day of the incident. In short, Puncak Niaga's claim for special damages were not supported by independent documents to substantiate their claim.

[64] In the case of *Syarikat Pertanian Emmal Sdn Bhd v Tractors Malaysia (1982) Sdn Bhd* [2009] 4 MLJ 223 at p 242; [2009] 10 CLJ 714 at p 732:

DW3 claimed that Chin Kui Foh's offer was initially rejected by the defendants even though it was a higher offer (RM1.9m) than the plaintiffs' (NOP Q188, 192, 194, 199, 200, 248 and 249), but when challenged that his story is only an afterthought (NOP 0202), *the defendants failed to produce any documentary evidence to substantiate this allegation*.

I agree with the plaintiffs that an adverse inference should be drawn against the defendants to the effect that if the relevant documents had been disclosed to the

court, there would have proved that the initial offer by Chin Kui Foh was lower than the plaintiffs' offer of RM1.6m in the letter of offer dated 18 August 2004. (Emphasis added.)

[65] Due to the absence of supporting documents, I found that Puncak Niaga had failed to prove their claim for special damages.

[66] With regard to Syabas's claim, evidence was led through its assistant general manager, PW5, Mr Mohd Yusri bin Abu Samah, who testified on the amount of losses suffered by them. According to PW5, he himself had prepared the summary with regard to the cost of tankers that Syabas had utilised at the time of the incident. However in his evidence, PW5 admitted that the summary that he prepared was actually based on a summary that was written on a white board and that the summary had not been approved by the accounts department.

[67] Further, PW5 stated that the other claims made by them were calculated during a meeting with the management team. No documentary proof was tendered that such a meeting was held through minutes of meeting and that the calculation was approved by the management or that payments had been made by Syabas.

[68] There are also uncertainty and irregularities pertaining to the claim made by Syabas. The evidence by PW5 revealed that the punch cards for the year 2006 had been referred to in support of their claim for labour cost whereas the incident happened on 9 September 2005. This, in my view, had raised doubts on whether Syabas had suffered such losses as a result of the incident. In short, both Puncak Niaga and Syabas claims for special damages were not supported by independent documents.

[69] Be that as it may, the court is guided by the principle in *Tahan Steel Corporation Sdn Bhd* whereby even though the plaintiffs had failed to prove their claim for special damages, nominal damages can still be awarded to the plaintiffs as it can be reasonably presumed that the plaintiffs had suffered from certain amount of losses as a result of the breach by the first defendant. For that reason, I awarded nominal damages of RM50,000 to Puncak Niaga and RM75,000 to Syabas with interest of 5%pa from the date of filing of the writ to the date of full realisation; which I feel, in the circumstances, is reasonable.

COSTS

[70] With regard to costs, Mr See Jooi Hong prayed for RM40,000 as costs for both the plaintiffs and Mr Thinagaran Batumalai prayed for RM10,000. I

awarded costs of RM25,000 to be paid for both the plaintiffs which amount, I feel, to be adequate in the circumstances

[71] Plaintiffs claim allowed with costs.

Plaintiff's claims allowed with costs.

Reported by Kanesh Sundrum